U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090

(b)(6)

U.S. Citizenship and Immigration Services

DATE: JUN 2 0 2013 OFFICE: TEXAS SERVICE CENTER FILE:

IN RE: Petitioner:
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)(A)

ON BEHALF OF PETITIONER:

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen in accordance with the instructions on Form I-290B, Notice of Appeal or Motion, with a fee of $630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: The Director, Texas Service Center, denied the employment-based immigrant visa petition, which is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner seeks classification for the beneficiary as an "alien of exceptional ability," as a designer and olive wood sculptor, pursuant to section 203(b)(2)(A) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2)(A). The petitioner further asserts that the beneficiary qualifies for blanket labor certification pursuant to 20 C.F.R. § 656.5, Schedule A, Group II.

The director found that "the beneficiary has not met all of the terms listed on the application for labor certification" and that "the beneficiary cannot be found to be qualified for the position." The director also found that "it has not been demonstrated that the beneficiary is an alien of exceptional ability." Finally, the director found that since "[t]he petitioner did not submit a list of his personal monthly expenses which would enable USCIS to analyze the petitioner's continuing ability to pay the proffered wage," the record does not contain evidence "that the petitioner had the ability to pay the proffered wage at the time the priority date was established and continuing to the present."

On appeal, counsel submits a brief and additional evidence. The AAO conducts appellate review on a *de novo* basis. The AAO's *de novo* authority is well recognized by the federal courts. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). For the reasons discussed below, upon review of the entire record, the AAO upholds the director's conclusion that the petitioner has not established the beneficiary's eligibility for the classification sought.

I. LAW

Section 203(b) of the Immigration and Nationality Act (the Act) states in pertinent part that:

> (2) Aliens Who Are Members of the Professions Holding Advanced Degrees or Aliens of Exceptional Ability.--
>
> > (A) In General. -- Visas shall be made available . . . to qualified immigrants who are members of the professions holding advanced degrees or their equivalent or who because of their exceptional ability in the sciences, arts, or business, will substantially benefit prospectively the national economy, cultural or educational interests, or welfare of the United States, and whose services in the sciences, arts, professions, or business are sought by an employer in the United States.

As stated by counsel on appeal, the petitioner is seeking classification for the beneficiary as an alien of extraordinary ability, and not a member of the professions holding an advanced degree. The regulation at 8 C.F.R. § 204.5(k)(2) defines "exceptional ability" as "a degree of expertise significantly above that ordinarily encountered." The regulation at 8 C.F.R. § 204.5(k)(3)(ii) sets forth six criteria, at least three of which an alien must meet in order to qualify as an alien of exceptional ability in the sciences, the arts, or business.

Where the petitioner fails to submit the requisite evidence, the proper conclusion is that the petitioner failed to satisfy the regulatory requirement of three types of evidence. *See Kazarian v. USCIS*, 596 F.3d 1115, 1122 (9th Cir. March 4, 2010). If the petitioner has submitted the requisite evidence, USCIS makes a final merits determination as to whether the evidence demonstrates "a degree of expertise significantly above that ordinarily encountered." 8 C.F.R. § 204.5(k)(2); *see also Kazarian,* 596 F.3d at 1119-20. Only aliens whose achievements have garnered "a degree of expertise significantly above that ordinarily encountered" are eligible for classification as aliens of exceptional ability. 8 C.F.R. § 204.5(k)(2); *see also Kazarian,* 596 F.3d at 119-22.

While involving a different classification than the one at issue in this matter, the similarity of the two classifications makes the court's reasoning in *Kazarian* persuasive to the classification sought in this matter. Specifically, the regulations state a regulatory standard and provide a list of suggested types of evidence, of which the petitioner must submit a certain number. Significantly, USCIS may not unilaterally impose novel substantive or evidentiary requirements beyond those set forth at 8 C.F.R. § 204.5. *Kazarian,* 596 F.3d at 1221, *citing Love Korean Church v. Chertoff,* 549 F.3d 749, 758 (9th Cir.2008). Thus, if the regulatory standard is to have any meaning, USCIS must be able to evaluate the quality of the evidence in a final merits determination.

The *Kazarian* court stated that the AAO's evaluation rested on an improper understanding of the regulations. Instead of parsing the significance of evidence as part of the initial inquiry, the court stated that "the proper procedure is to count the types of evidence provided (which the AAO did)," and if the petitioner failed to submit sufficient evidence, "the proper conclusion is that the applicant has failed to satisfy the regulatory requirement of three types of evidence (as the AAO concluded)." *Id.* at 1122 (citing to 8 C.F.R. § 204.5(h)(3)).

Thus, *Kazarian* sets forth a two-part approach where the evidence is first counted and then considered in the context of a final merits determination. In the instant petition, although the director found that the petitioner submitted qualifying evidence on behalf of the beneficiary only under the membership and experience criteria, the decision incorrectly later states that three criterion had been met. In this matter, the AAO will review the evidence under the plain language requirements of each criterion claimed. As the petitioner did not submit qualifying evidence on behalf of the beneficiary under at least three criteria, the proper conclusion is that the petitioner has failed to satisfy the antecedent regulatory requirement of three types of evidence. *Id.*

II. ANALYSIS

A. Evidentiary Criteria[1]

An official academic record showing that the alien has a degree, diploma, certificate, or similar award from a college, university, school, or other institution of learning relating to the area of exceptional ability

The proffered job in the instant petition is " ." The petitioner submitted a certificate from in Jordan which states that the beneficiary was awarded a Bachelor of Science in Computer Science & Computer Information Systems. The petitioner also submitted transcripts from which shows that the beneficiary received a Master of Science in Management with a concentration in Business Administration.

The director stated in his decision: "the beneficiary's degree is not in a field related to his claim of exceptional ability." On appeal, counsel asserts that some of the beneficiary's courses at and "his underlying degree in Computer Science directly relate to and are required for the work performed for [the petitioner]." The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). In response to the director's request for evidence, counsel references the November 17, 2010 letter from Chairman of the Board of states that the beneficiary's "schooling in computer and computer marketing directly relate to marketing and developing our capabilities technically and managerially." Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg'l Comm'r 1972)).

While the job duties on the ETA Form 9089, Part H, line 11, include managing and maintaining national sales and marketing products, the beneficiary's claimed area of exceptional ability is solely as an olive wood carver. Thus, the beneficiary's degrees do not relate to his claimed area of exceptional ability.

In light of the above, the petitioner has not submitted qualifying evidence that the beneficiary meets the plain language requirements set forth at 8 C.F.R. § 204.5(k)(3)(ii)(A).

[1] The petitioner does not claim to meet or submit evidence relating to the regulatory categories of evidence not discussed in this decision.

Evidence in the form of letter(s) from current or former employer(s) showing that the alien has at least ten years of full-time experience in the occupation for which he or she is being sought

The regulation at 8 C.F.R. § 204.5(g)(1) states that evidence of experience "shall" be in the form of letters from current or former employers. Upon review of the entire record, the director's finding for this criterion must be withdrawn. The submitted employer letters and ETA Form 9089, while covering more than ten years, do not provide sufficient information to determine whether or not the employment was *full-time*, as required by the regulation. Furthermore, there are inconsistencies in the record regarding the beneficiary's employment. The beneficiary's claimed and documented experience is as follows:

Employer	**ETA Form 9089**	**Employer Letters**
Petitioner	December 1, 2004 to present, 40 hours per week.	Confirmation that the beneficiary has been in the United States since 2004, but no employment dates or hours specified.
	November 1, 1999 to April 30, 2002, 40 hours per week.	November 1, 1999 to April 30, 2002. No hours listed.
	May 1, 1995 to April 30, 2002, 40 hours per week.	No employment dates provided.
	Not listed	May 1, 1995 to April 30, 1999.
	Not listed	February 25, 2004 letter states that the beneficiary "is one of our designers in the workshop since 1998."
	Not listed	Employment as a teacher 1997 through 2002.

Based upon information in the record, it appears there were times where the beneficiary was working for more than one employer. In addition, the ETA Form 9089 states that the beneficiary has been employed by the petitioner since December 1, 2004. The record indicates that the beneficiary was pursuing his master's degree from July 8, 2007 until September 27, 2008. Based on the above, the petitioner has not established with relevant, probative and credible evidence whether any of the employment was full-time. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Id.*

In light of the above, the petitioner has not submitted qualifying evidence that meets the plain language requirements set forth at 8 C.F.R. § 204.5(k)(3)(ii)(B).

Evidence that the alien has commanded a salary, or other remuneration for services, which demonstrates exceptional ability

The director discussed the submitted evidence and found that the petitioner failed to establish that the evidence was qualifying. On appeal, the petitioner does not contest the director's findings for this criterion or offer additional arguments. The record contains only a single Internal Revenue Service (IRS) Form W-2 for the beneficiary and it shows wages of only $25,000, less than the prevailing wage of $38,688. As the petitioner has not demonstrated why a salary below the prevailing wage is demonstrative of exceptional ability, the petitioner has not submitted evidence that meets the plain language requirements of the criterion.

Evidence of membership in professional associations

Upon review of the entire record, the director's finding for this criterion must be withdrawn.

As defined at section 101(a)(32) of the act, profession "shall include but not be limited to architects, engineers, lawyers, physicians, surgeons, and teachers in elementary or secondary schools, colleges, academies, or seminaries." The regulation at 8 C.F.R. § 204.5(k)(2), in pertinent part, defines "profession" as follows:

> [O]ne of the occupations listed in section 101(a)(32) of the Act, as well as any occupation for which a United States baccalaureate degree or its foreign equivalent is the minimum requirement for entry into the occupation.

In response to the director's request for evidence, the petitioner submitted a letter from , Chairman of the Board of . The letter states that "[m]ost of our Society members are not formally educated." The letter does not explicitly state that the beneficiary is a member of the society.

The record does not establish that a baccalaureate degree is the minimum requirement for entry into the occupation of designer and olive wood sculptor.

Even if the beneficiary's alleged membership in the society constituted comparable evidence under 8 C.F.R. § 204.5(k)(3)(ii)(E), the plain language of this regulation requires evidence of membership in professional "associations" in the plural. Significantly, not all of the criteria at 8 C.F.R. § 204.5(k)(3)(ii) are worded in the plural. Specifically, the regulations at 8 C.F.R. §§ 204.5(k)(3)(ii)(A), (C) and (D) only require one academic record, a single license and a single high salary. When a regulatory criterion wishes to include the singular within the plural, it expressly does so as when it states at 8 C.F.R. § 204.5(k)(3)(ii)(B) that evidence of experience must be in the form of "letter(s)." Thus, the AAO can infer that the plural in the remaining regulatory criteria has meaning. In a different context,

federal courts have upheld USCIS' ability to interpret significance from whether the singular or plural is used in a regulation.[2]

In light of the above, the petitioner has not submitted qualifying evidence that meets the plain language requirements set forth at 8 C.F.R. § 204.5(k)(3)(ii)(E).

> *Evidence of recognition for achievements and significant contributions to the industry or field by peers, governmental entities, or professional or business organizations*

While counsel is correct that a November 3, 2010 request for evidence stated that this criterion had been met, the April 24, 2012 request for evidence stated that it had not been met and provided a detailed description of the types of evidence necessary to satisfy this criterion. Furthermore, the director's decision stated that the evidence does not "demonstrate that the designs presented as being those of the beneficiary are indeed his work and have been adopted by the artisan community as claimed." The decision also states that "the evidence does not demonstrate that the beneficiary's designs and contributions have made the financial impact as described in the letters of support."

In response to the 2012 request for evidence, counsel simply stated that "[e]vidence was provided in our original I-140 submission at exhibits 5.1-34 and 6.1-8." He further stated that "[t]he USCIS 2010 RFE concedes, at page 3, that this criteria has been met." asserts that the members have copied the beneficiary's design of a crucifix with containers to be filled with soil from the Holy Land and sold that design widely. further asserts that the beneficiary has contributed to the industry by introducing the work of the society to Christians who are reluctant to travel to Bethlehem.

The petitioner claims that the beneficiary has exceptional ability as a carver; thus, at issue are his contributions to the field of carving. does not provide examples of peer recognition the beneficiary has received. Moreover, the letters from several workshops provide near identical language regarding the popularity of the beneficiary's designs. Specifically, the letters provide the following sentences near verbatim:

> One of my company's biggest sellers is the olivewood crucifix containing four religiously significant items from Bethlehem. We know this to be [the beneficiary's] design. He has other designs as well, but this is the most popular. The design alone is responsible for approximately 25% of my company's sales.

The use of boilerplate language reduces the probative value of the letters. *See Surinder Singh v. Board of Immigration Appeals*, 438 F.3d 145, 148 (2d Cir. 2006) (upholding an immigration judge's adverse credibility determination in asylum proceedings based in part on the similarity of some of

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[2] *See Maramjaya v. USCIS*, Civ. Act. No. 06-2158 (RCL) at 12 (D.C. Cir. March 26, 2008); *Snapnames.com Inc. v. Chertoff*, 2006 WL 3491005 at *10 (D. Or. Nov. 30, 2006) (upholding an interpretation that the regulatory requirement for "a" bachelor's degree or "a" foreign equivalent degree at 8 C.F.R. § 204.5(l)(2) requires a single degree rather than a combination of academic credentials).

the affidavits; *see also Mei Chai Ye v. U.S. Dept. of Justice*, 489 F.3d 517, 519 (2d Cir. 2007) (concluding that an immigration judge may reasonably infer that when an asylum applicant submits strikingly similar affidavits, the applicant is the common source).

The record does not contain relevant, probative and credible evidence of the beneficiary's recognition for achievements and significant contributions to the field of olive wood carving.

In summary, the petitioner has not submitted the initial required evidence under at least three of the criteria at 8 C.F.R. § 204.5(k)(3)(ii). Nevertheless, the AAO will review the evidence in the aggregate as part of a final merits determination.

Section 203(b)(2)(c) of the Act expressly states that "possession of a []diploma…or a license to practice…shall not by itself be considered sufficient evidence of such exceptional ability." Thus, even if the beneficiary's degree were related to his area of claimed exceptional ability, that degree by itself would be insufficient. While the record does suggest that the beneficiary is an experienced olive wood carver who has worked through the petitioner to sell products from Bethlehem in the United States, the record lacks relevant, probative and credible evidence that his expertise as a carver and designer are significantly above that ordinarily encountered among olive wood carvers.

Thus, the petitioner has not established that the beneficiary is qualified for the classification sought. On that basis alone the petition cannot be approved.

II. ABILITY TO PAY

The regulation 8 C.F.R. § 204.5(g)(2) states in pertinent part:

> *Ability of prospective employer to pay wage.* Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements.

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date. *See* 8 C.F.R. § 204.5(d). Here, the priority date is June 11, 2010. The proffered wage as stated on the ETA Form 9089 is $46,000 per year. The director discussed the submitted evidence and found that the petitioner failed to establish that the evidence was qualifying. On appeal, counsel asserts that the petitioner's assets, including real estate and cash, are sufficient evidence that he has the ability to pay the proffered wage. Counsel further asserts that the petitioner has paid the beneficiary a salary exceeding the prevailing wage.

In determining the petitioner's ability to pay the proffered wage during a given period, USCIS will first examine whether the petitioner employed and paid the beneficiary during that period. If the

petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. On the ETA Form 9089, signed by the beneficiary on May 17, 2010, the beneficiary claimed to have worked for the petitioner since December 21, 2004. As evidence of his wages, however, the petitioner submitted only a 2011 IRS Form W-2 the petitioner issued to the beneficiary reflecting wages of $25,000. These wages are $21,000 less than the proffered wage and $13,688 less than the prevailing wage. Thus, the petitioner has not established that it employed and paid the beneficiary the full proffered wage from the priority date in 2010 onwards.

The evidence in the record of proceeding shows that the petitioner is structured as a sole proprietorship. On the petition, the petitioner claimed to have been established in 2004 and to currently employ three workers.

Unlike a corporation, a sole proprietorship does not exist as an entity apart from the individual owner. *See Matter of United Investment Group*, 19 I&N Dec. 248, 250 (Comm'r 1984). Therefore the sole proprietor's adjusted gross income, assets and personal liabilities are also considered as part of the petitioner's ability to pay. Sole proprietors report income and expenses from their businesses on their individual (IRS Form 1040) federal tax return each year. The business-related income and expenses are reported on Schedule C and are carried forward to the first page of the tax return. Sole proprietors must show that they can cover their existing business expenses as well as pay the proffered wage out of their adjusted gross income or other available funds. In addition, sole proprietors must show that they can sustain themselves and their dependents. *See Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983).

In *Ubeda*, 539 F. Supp. at 650, the court concluded that it was highly unlikely that a petitioner could support himself, his spouse and five dependents on a gross income of slightly more than $20,000 where the beneficiary's proposed salary was $6,000 or approximately thirty percent (30%) of the petitioner's gross income.

In the instant case, the sole proprietor supports a family of three. The proprietor's tax returns reflect the sole proprietor's adjusted gross income of $3,743 for the relevant year, 2010.

In 2010, the sole proprietor's adjusted gross income of $3,743 fails to cover the proffered wage of $46,000. It is improbable that the sole proprietor could support himself on a deficit, which is what remains after reducing the adjusted gross income by the amount required to pay the proffered wage. Regarding the sole proprietor's real estate, a home is not a readily liquefiable asset. Further, it is unlikely that a sole proprietor would sell such a significant personal asset to pay the beneficiary's wage. USCIS may reject a fact stated in the petition if it does not believe that fact to be true. Section 204(b) of the Act, 8 U.S.C. § 1154(b); *see also Anetekhai v. I.N.S.*, 876 F.2d 1218, 1220 (5th Cir. 1989); *Lu-Ann Bakery Shop, Inc. v. Nelson,* 705 F. Supp. 7, 10 (D.D.C. 1988); *Systronics Corp. v. INS,* 153 F. Supp. 2d 7, 15 (D.D.C. 2001).

Finally, the director determined that USCIS would be unable to "analyze the petitioner's continuing ability to pay the proffered wage beginning on the priority date as sole proprietorship," without a "list of [] personal monthly expenses." As the director placed the petitioner on notice of this issue in his decision and the petitioner failed to provide this information on appeal, the petitioner has abandoned this claim. *See Sepulveda v. U.S. Att'y Gen.*, 401 F.3d 1226, 1228 n. 2 (11th Cir. 2005), citing *United States v. Cunningham*, 161 F.3d 1343, 1344 (11th Cir. 1998); *see also Hristov v. Roark*, No. 09–CV–27312011, 2011 WL 4711885 at *1, *9 (E.D.N.Y. Sept. 30, 2011) (plaintiff's claims were abandoned as he failed to raise them on appeal to the AAO).

On this basis alone, the petition cannot be approved.

III. QUALIFICATIONS FOR JOB OFFERED

When determining whether a beneficiary is eligible for a preference immigrant visa, USCIS may not ignore a term of the labor certification, in this case an ETA Form 9089, nor may it impose additional requirements. *See Madany* v. *Smith,* 696 F.2d 1008, 1015 (D.C. Cir. 1983). USCIS must examine "the language of the labor certification job requirements" in order to determine what the job requires. *Id.* The only rational manner by which USCIS can be expected to interpret the meaning of terms used to describe the requirements of a job in a labor certification is to examine the certified job offer *exactly* as it is completed by the prospective employer. *See Rosedale Linden Park Company v. Smith*, 595 F. Supp. 829, 833 (D.D.C. 1984) (emphasis added). USCIS's interpretation of the job's requirements, as stated on the labor certification must involve reading and applying *the plain language* of the alien employment certification application form. *See id.* at 834. USCIS cannot and should not reasonably be expected to look beyond the plain language of the labor certification that the DOL has formally issued or otherwise attempt to divine the employer's intentions through some sort of reverse engineering of the labor certification.

The required education, training, experience, and special requirements for the offered position are set forth at Part H of the ETA Form 9089. Here, Part H shows that the position requires a bachelor's degree, or foreign educational equivalent, in any related field plus five years of training in design and wood sculpting of religious items and five years of experience in the job offered. The petitioner has not established with relevant, probative and credible evidence that the beneficiary meets the requirements set forth on the ETA Form 9089.

The beneficiary set forth his credentials on the ETA Form 9089 and signed his name, under a declaration that the contents of the form are true and correct under the penalty of perjury. On the section of the ETA Form 9089 eliciting information of the beneficiary's education, he states that he received a master's degree in computer information systems from [redacted] However, the transcripts submitted by the petitioner state the beneficiary received a Master of Science in Management with a concentration in Business Administration. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. at 591-92. Doubt cast on any aspect of

the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Id.* While the record contains no probative or credible evidence that the beneficiary's degrees are in a related field to his claimed area of expertise, olive wood carving, the job duties on the ETA Form 9089, Part H, line 11, do include "manage and maintain national sales and marketing products." Thus, the record demonstrates that the beneficiary has a related degree to some of the job duties.

Nevertheless, the ETA Form 9089 states that the position requires five years of training, in addition to five years of employment in the job offered. As previously discussed, based upon the inconsistencies in the ETA Form 9089 and the employment verification letters in the record, it cannot be determined whether the beneficiary meets the requirement of five years of employment in the job offered. Furthermore, although the director's decision stated that there was no evidence that the beneficiary "has the required five years of training," the petitioner, on appeal, failed to address or provide any evidence that the beneficiary had met the required five years of training. As the director stated this deficiency in his decision and the petitioner failed to provide this information on appeal, the petitioner has abandoned this claim. *See Sepulveda v. U.S. Att'y Gen.*, 401 F.3d 1228 n. 2, *Hristov v. Roark*, 2011 WL 4711885 at *9.

On this basis alone, the petition may not be approved.

IV. SCHEDULE A GROUP II DESIGNATION

A. Prevailing Wage Determination

The regulation at 20 C.F.R. § 656.15 provides, in pertinent part:

> (a) *Filing application.* An employer must apply for a labor certification for a Schedule A occupation by filing an application with the appropriate DHS office, and not with an ETA application processing center.
>
> (b) *General documentation requirements.* A Schedule A application must include:
>
> (1) An Application for Permanent Employment Certification form, which includes a prevailing wage determination in accordance with § 656.40 and § 656.41.
>
> (2) Evidence that notice of filing the Application for Permanent Employment Certification was provided to the bargaining representative or the employer's employees as prescribed in § 656.10(d).

While not addressed by the director in his decision, contrary to the ETA Form 9089 which states that the prevailing wage determination was valid until June 30, 2010, the prevailing wage determination was only valid until June 30, 2009.

In the instant case, the petitioner did not file its schedule A application within the validity period of the prevailing wage determination and therefore, failed to comply with the regulatory requirements.

B. Schedule A, Group II Designation

(i) Law

The regulation at 20 C.F.R. § 656.15(d)(1) provides, in pertinent part:

> An employer seeking labor certification on behalf of an alien to be employed as an alien of exceptional ability in the sciences or arts (excluding those in the performing arts) must file documentary evidence showing the *widespread acclaim and international recognition* accorded the alien by recognized experts in the alien's field; and documentation showing the alien's work in that field during the past year did, and the alien's intended work in the United States will, require exceptional ability. In addition, the employer must file documentation about the alien from at least two of the following seven groups:
>
> (i) Documentation of the alien's receipt of internationally recognized prizes or awards for excellence in the field for which certification is sought;
>
> (ii) Documentation of the alien's membership in international associations, in the field for which certification is sought, which require outstanding achievement of their members, as judged by recognized international experts in their disciplines or fields;
>
> (iii) Published material in professional publications about the alien, about the alien's work in the field for which certification is sought, which shall include the title, date and author of such published material;
>
> (iv) Evidence of the alien's participation on a panel, or individually, as a judge of the work of others in the same or in an allied field of specialization to that for which certification is sought;
>
> (v) Evidence of the alien's original scientific or scholarly research contributions of major significance in the field for which certification is sought;
>
> (vi) Evidence of the alien's authorship of published scientific or scholarly articles in the field for which certification is sought, in international professional journals or professional journals with an international circulation;
>
> (vii) Evidence of the display of the alien's work, in the field for which certification is sought, at artistic exhibitions in more than one country.

(Emphasis added.)

As stated previously, *Kazarian* sets forth a two-part approach where the evidence is first counted and then considered in the context of a final merits determination. Moreover, when the Department of Labor adjudicated Schedule A Group II filings, the Board of Alien Labor Certification Appeals (BALCA) concluded that the ultimate fact to be proven is that the alien has exceptional ability; and that the various kinds of documentation mentioned in the regulation are suggested as possible methods of proof. *Matter of Allied Concert Services, Inc.*, 88-INA-14 (BALCA 1988). Thus, the AAO finds *Kazarian* to be persuasive authority in this matter. The AAO will first review the evidence under the plain language requirements of each criterion claimed. As the petitioner did not submit qualifying evidence on behalf of the beneficiary under at least two criteria, the proper conclusion is that the petitioner has failed to satisfy the antecedent regulatory requirement of two types of evidence.

(ii) Analysis

While the use of comparable evidence is permitted under different classifications, there is no regulatory provision that would allow the use of comparable evidence to satisfy the evidentiary requirements for Schedule A, Group II. Therefore, the AAO will review the evidence under the plain language requirements of each criterion claimed.

(iii) Evidentiary Criteria[3]

Documentation of the alien's receipt of internationally recognized prizes or awards for excellence in the field for which certification is sought

In the initial petition, counsel cites to the letter from which states that "due to the…unstable situation in the Holy Land they had no chance…of getting any distinguished awards." In response to the director's request for evidence, counsel "concede[s] that evidence was not provided in this category." Although counsel requests that comparable evidence be considered, as stated above, there is no regulatory provision that would allow such consideration.

In light of the above, the petitioner has not submitted qualifying evidence that the beneficiary meets the plain language requirements.

[3] The petitioner does not claim to meet or submit evidence relating to the regulatory categories of evidence not discussed in this decision.

Evidence of the alien's original scientific or scholarly research contributions of major significance in the field for which certification is sought

The plain language of the regulation requires original *scientific or scholarly research contributions.* The beneficiary is an artist. While the record contains several letters praising the beneficiary and/or his work and referencing his original designs, the letters do not claim that the beneficiary has made original *scientific or scholarly research contributions of major significance.*

Vague, solicited letters from local colleagues that do not specifically identify contributions or provide specific examples of how those contributions influenced the field are insufficient. *Kazarian v. USCIS,* 580 F.3d 1030, 1036 (9th Cir. 2009) *aff'd in part* 596 F.3d 1115 (9th Cir. 2010).[4] USCIS need not accept primarily conclusory assertions. *1756, Inc. v. The Attorney General of the United States,* 745 F. Supp. 9, 15 (D.C. Dist. 1990).

In light of the above, the petitioner has not submitted qualifying evidence that the beneficiary meets the plain language requirements of the criterion.

Evidence of the display of the alien's work, in the field for which certification is sought, at artistic exhibitions in more than one country.

The record contains evidence that the beneficiary has displayed his work at a showroom at in Bethlehem and in the United States. Thus, the petitioner has submitted evidence that meets the plain language requirements of this criterion.

Had the petitioner submitted the requisite evidence under at least two evidentiary categories, in accordance with the *Kazarian* opinion, the next step would be a final merits determination that considers all of the evidence in the context of whether or not the petitioner has demonstrated the widespread acclaim and international recognition of the beneficiary by recognized experts in his field. 20 C.F.R. § 656.15(d)(1); *see also Kazarian,* 596 F.3d at 1119-20. While the AAO concludes that the evidence is not indicative of such acclaim and recognition, the AAO need not explain that conclusion in a final merits determination. Rather, the proper conclusion is that the petitioner has failed to satisfy the antecedent regulatory requirement of two types of evidence. *Id.* at 1122. On this basis alone, the petition cannot be approved.

IV. Bona Fide Job Offer

Matter of Silver Dragon Chinese Restaurant, 19 I&N Dec. 401 (Comm'r 1986), discussed a beneficiary's 50% ownership of the petitioning entity. The decision quoted an advisory opinion from the Chief of DOL's Division of Foreign Labor Certification as follows:

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[4] In 2010, the *Kazarian* court reiterated that the AAO's conclusion that "letters from physics professors attesting to [the alien's] contributions in the field" were insufficient was "consistent with the relevant regulatory language." 596 F.3d at 1122.

> The regulations require a 'job opportunity' to be 'clearly open.' Requiring the job opportunity to be bona fide adds no substance to the regulations, but simply clarifies that the job must truly exist and not merely exist on paper. The administrative interpretation thus advances the purpose of regulation 656.20(c)(8). Likewise requiring the job opportunity to be bona fide clarifies that a true opening must exist, and not merely the functional equivalent of self-employment. Thus, the administrative construction advances the purpose of regulations 656.20.

Id. at 405. Accordingly, where the beneficiary named in an alien labor certification application has an ownership interest in the petitioning entity, the petitioner must establish that the job is *bona fide*, or clearly open to U.S. workers. *See Keyjoy Trading Co.*, 1987-INA-592 (BALCA Dec. 15, 1987) (*en banc*). A relationship invalidating a *bona fide* job offer may also arise where the beneficiary is related to the petitioner by "blood" or it may "be financial, by marriage, or through friendship." *See Matter of Sunmart 374*, 2000-INA-93 (BALCA May 15, 2000).

The ETA Form 9089 specifically asks in Part C, line 9: "Is the employer a closely held corporation, partnership, or sole proprietorship in which the alien has an ownership interest, or is there a familial relationship between the owners, stockholders, partners, corporate officers, incorporators, and the alien?" The petitioner identified that it was an entity with three employees, and checked "yes" to the question of whether the beneficiary was related to the owner. In determining whether the job is subject to the alien's influence and control, the adjudicator will look to the totality of the circumstances. *See Modular Container Systems, Inc.*, 1989-INA-228 (BALCA Jul. 16, 1991) (*en banc*). The same standard has been incorporated into the PERM regulations. *See* 69 Fed. Reg. 77326, 77356 (ETA) (Dec. 27, 2004).

As the petitioner and beneficiary are father and son, there may be a familial and/or financial relationship that could preclude the existence of a valid employment relationship. Accordingly, if the appeal were not being dismissed for reasons set forth herein, the bona fides of the job offer would remain an unresolved issue.

V. CONCLUSION

The documentation submitted has not established that the petitioner has the ability to pay the proffered wage, that the beneficiary has a degree of expertise significantly above that ordinarily encountered, that the beneficiary meets the requirements set forth on the ETA Form 9089 or that the beneficiary is qualified for classification as an alien of exceptional ability under section 203(b)(2) of the Act or Schedule A, Group II designation. Thus, the petitioner has not established that the beneficiary is qualified for the benefit sought.

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

ORDER: The appeal is dismissed.